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No. 87-65

In The
Supreme Court of the United States
October Term, 1987

UNITED STATES OF AMERICA,
Petitioner,
v.
PROVIDENCE JOURNAL COMPANY and CHARLES M. HAUSER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

WILLIAM A. CURRAN
1210 Turks Head Building
Providence, RI 02903-2274
(401) 421-2154
Counsel of Record

ROBERT D. PARRILLO
1210 Turks Head Building
Providence, RI 02903-2274
(401) 421-2154
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

I. Whether a trial judge has authority to restrain publication while considering an unprecedented conflict between first amendment and fourth amendment rights.

II. Whether a prior restraint order involving an unprecedented question of priority of fourth amendment rights of privacy versus first amendment rights of free press was "transparently invalid."

LIST OF PARTIES

Petitioner is the United States of America. The proceedings below were criminal contempt proceedings entitled *In the Matter of Application to Adjudge the Providence Journal Company and its Executive Editor, Charles M. Hauser, in Criminal Contempt.* That case was initiated by a special prosecutor appointed pursuant to Fed. R. Crim. P. 42(b).

Respondents are the Providence Journal Company and Charles M. Hauser, defendants below.

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OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. A-27-A-46) is reported at 820 F.2d 1342. An en banc addendum to, and modification of, that opinion (Pet. App. A-47-A-49) is reported at 820 F.2d 1354.

The opinion of the district court (Pet. App. A-1-A-22) is reported at 630 F. Supp. 993. A later rescript order imposing sentences (Pet. App. A-43-A-26) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1986. (A. 1). A petition for rehearing was denied on May 12, 1986. The petition for writ of certiorari was filed on July 9, 1987 and was granted on October 5, 1987.

The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. § 1254(1).

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STATUTES INVOLVED

Pertinent texts which are not set forth in the petition for certiorari are set forth in the appendix to this brief.

Constitutional Provisions:

U.S. Const. art. III, § 1

U.S. Const. amend. I

U.S. Const. amend. IV

Statutes:

Crimes and Criminal Procedure, ch. 645, § 1, 62 Stat. 701 (1948) (codified as amended at 18 U.S.C. § 401 (3) (1982 & Supp. III 1985))

Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914) (codified as amended at 15 U.S.C. § 45(b) (1982 & Supp. III 1985))

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Judicial Code, ch. 231, § 240, 36 Stat. 1157 (1948) (codified as amended at 28 U.S.C. § 1254(1) (1982 & Supp. III 1985))

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Omnibus Crime Control and Safe Streets Act, P.L. 90-351, 82 Stat. 223 (1968) (codified as amended at 18 U.S.C. § 2520 (1982 & Supp. III 1985)).

Rule:

Fed. R. Crim. P. 42(b)

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STATEMENT OF THE CASE

I. Illegal Entry and Seizure

From 1962 to 1965 the Federal Bureau of Investigation (hereinafter "FBI") conducted electronic surveillance at the offices of Raymond L. S. Patriarca, a reputed organized crime figure. (J.A. 74, 208). *See Providence Journal Co. v. Federal Bureau of Investigation,* 460 F. Supp. 762, 460 F. Supp. 778 (D.R.I. 1978), *stay issued,* 595 F.2d 889, *rev'd,* 602 F.2d 1010, 1011 (1st Cir. 1979), *cert. denied,* 444 U.S. 1071 (1980). The FBI had not obtained a warrant for its intrusion. *(Id.).* The surveillance was conducted in violation of fourth amendment rights. (*Id.,* J.A. 75, 83, 200 (November 19, 1985 entry), Pet. App. A-1, A-2). Tape recordings were made by the FBI of conversations overheard at the Patriarca offices. (J.A. 74, 75, *Providence Journal Co. v. Federal Bureau of Investigation,* 602 F.2d

at 1011). The tape recordings were eventually destroyed but logs and memoranda prepared after listening to the conversations were made and retained. (J.A. 74, 75, *Providence Journal Co. v. Federal Bureau of Investigation,* 602 F.2d at 1011).

II. Production of Illegally Seized Materials to the Providence Journal Company

(Providence Journal Co. v. Federal Bureau of Investigation)

In 1976, during Raymond L. S. Patriarca's lifetime, respondent Providence Journal Company (hereinafter "Journal"), a newspaper circulated throughout Rhode Island (Pet. App. A-2), sought to obtain, under the Freedom of Information Act,[1] the fruits of the illegal FBI electronic surveillance of the Patriarca offices. *Providence Journal Co. v. Federal Bureau of Investigation,* 602 F.2d at 1011. That request was denied administratively on the ground that release of the FBI materials would result in an unwarranted invasion of personal privacy. (*Id.,* J.A. 214-16). The Journal appealed that ruling to the United States District Court for the District of Rhode Island. *Providence Journal Co. v. Federal Bureau of Investigation,* 602 F.2d at 1011. Raymond L. S. Patriarca was allowed to intervene as a party defendant. *Id.* In 1979 the district court entered an order requiring the FBI to produce some of the illegally obtained materials to the Journal. 602 F.2d at 1012. Excluded from that order were

[1]Freedom of Information Act, P.L. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1982 & Supp. III 1985)).

materials relating to Raymond L. S. Patriarca's "private life, and to the private lives of his family members who are still living. . . ." *Id.*

The FBI and Raymond L. S. Patriarca appealed and requested that the trial court stay its order pending the appeal. *Providence Journal Co. v. Federal Bureau of Investigation,* 595 F.2d 889, 890 (1st Cir. 1979). The trial court granted only a brief stay since it believed that anything more would constitute a prior restraint of the Journal's publication rights. 595 F.2d at 890.

Motions for stays were then addressed to the Court of Appeals for the First Circuit. *Providence Journal Co. v. Federal Bureau of Investigation,* 595 F.2d 889 (1st Cir. 1979). The court of appeals balanced the Journal's right of access and publication of the materials against Raymond L. S. Patriarca's right of privacy and the FBI's rights. 595 F.2d at 890. It held that denial of a stay would irreparably harm movants but it would simply delay publication—assuming the Journal prevailed at the court of appeals—during the time that the appeals were being considered. *Id.* Therefore, the order requiring disclosure by the FBI to the Journal was stayed. *Id.*

The court of appeals eventually reversed the order. *Providence Journal Co. v. Federal Bureau of Investigation,* 602 F.2d at 1015. In its opinion, the court noted that Congress "in the clearest way" had decided that where illegal electronic surveillance invades privacy, disclosure of such illegally gathered information should be prohib-

ited.[2] 602 F.2d at 1013. Thus, it upheld the FBI's denial of the Journal's request for the materials and reversed the district court's order. 602 F.2d at 1015.

In 1985, after Raymond L. S. Patriarca's death, the Journal once again requested that the FBI produce the Patriarca materials (J.A. 90). Its request contained no reference to the opinion of the First Circuit. (*Id.*). On June 13, 1985 the FBI made the Patriarca materials available to the Journal. (J.A. 96-97).

III. Temporary Restraining Order Enjoining Publication

(Patriarca v. Federal Bureau of Investigation)

On September 22, 1985 *The Hartford Courant* published an article regarding the FBI's Patriarca materials. (J.A. 35, 101-13). Raymond J. Patriarca (hereinafter "Patriarca"), the son of Raymond L. S. Patriarca, became aware of this publication (J.A. 212) and also learned that the FBI had, at a date then unknown to him, authorized release of the Patriarca materials to the Journal and WJAR-TV Television Ten, Inc. (hereinafter "WJAR-TV"), a Rhode Island television station. (J.A. 209).

On November 8, 1985 Patriarca filed a complaint against the FBI, its director, the United States Department of Justice, the Attorney General, the Journal and WJAR-TV. (J.A. 33, 199, 206). The complaint alleged

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[2]Omnibus Crime Control and Safe Streets Act, P.L. 90-351, 82 Stat. 213 (1968) (codified as amended at 18 U.S.C. § 2511(1) (1982 & Supp. III 1985)).

Omnibus Crime Control and Safe Streets Act, P.L. 90-351, 82 Stat. 223 (1968) (codified as amended at 18 U.S.C. § 2520 (1982 & Supp. III 1985)).

that the FBI listening device was placed by means of illegal entry and installation in violation of Raymond L. S. Patriarca and Raymond J. Patriarca's fourth amendment rights. (J.A. 208). Patriarca alleged that airing the FBI materials would be an unwarranted invasion of his privacy. (J.A. 210). The complaint also alleged that the disclosure of the FBI materials was a violation of established policy of the Department of Justice and the Attorney General. (J.A. 210, 214-15).

The complaint sought, among other things, to enjoin the Journal from publishing information which would constitute an unwarranted invasion of Patriarca's personal privacy. (J.A. 210, 24 & 2). Along with the complaint, Patriarca filed a motion for a temporary restraining order and/or injunctive relief. (J.A. 199, 217-18). Accompanying the complaint and motion for injunctive relief was a supporting affidavit. (J.A. 199, 219-20). The affidavit asserted that constitutional questions were raised and that Patriarca would suffer irreparable harm from dissemination and publication of the FBI materials. (J.A. 219-20).

On Wednesday, November 13, 1985, at about 12:30 p.m., a chambers conference was held by Chief Judge Boyle to consider Patriarca's motion. (J.A. 33, 175-76). The court heard all counsel. (J.A. 166, 169). Among others in attendance at the conference were attorneys from a law firm which represented both the Journal and WJAR-TV. (J.A. 165). They argued that the requested order would be an unlawful prior restraint. (J.A. 169, 171, 172). The court expressed concern with the effect of publication on Patriarca's privacy interest and fourth amendment rights. (J.A. 174, *see also* J.A. 73, 182). The trial judge consid-

sidered whether the conflict between Patriarca's fourth amendment rights and the Journal's first amendment rights was as serious as the conflict between first amendment free press and sixth amendment fair trial rights. (J.A. 174, *see also* J.A. 73, 182). No precedent was offered regarding this dilemma. (J.A. 75, 174, Pet. App. A-12-A-13). The trial judge apparently was influenced by the fact that the FBI materials were illegally seized and that the First Circuit had earlier denied the Journal access to those materials. (J.A. 74, 83, 179, Pet. App. A-5, A-9, A-10, *see also* 73, 174, 182, 184, 186).

The trial court, because of its concern regarding a prior restraint, indicated that the matter would be heard the next morning, November 14, 1985. (J.A. 34, 73, 167). Counsel for the Journal indicated that they would need more time to prepare. (J.A. 167, Pet. App. A-3, A-10-A-11, A-13). The court acceded to the Journal's request and scheduled a hearing for Friday, November 15, 1985. (J.A. 34, 37, 73, 167, Pet. App. A-3, A-10-A-11). To preserve the status quo, an order was entered enjoining publication by the Journal and WJAR-TV of the illegally gathered materials as they relate to Patriarca pending the November 15, 1985 hearing. (J.A. 37, 73, 172, Pet. App. A-10, A-18). The court instructed counsel to return to court on November 15, 1985 and to bring some legal authority with them. (J.A. 174). The restraining order as it pertained to the media defendants was eventually vacated by Chief Judge Boyle on November 19, 1985. (J.A. 10, 89). At the same time a preliminary injunction entered enjoining the FBI and the United States Department of Justice from further dissemination, publication or other release of the materials regarding Patriarca. (J.A. 201

(second November 19, 1985 entry), R. (*Patriarca v. FBI*, C.A. 85-0707B) 18).

No request was made by the Journal to either the trial court or the Court of Appeals for the First Circuit to vacate or stay the order. (J.A. 36). No petition for mandamus was made to the court of appeals. (*Id.*) No appeal of the temporary restraining order was taken. (*Id.*).

IV. Criminal Contempt

The Journal's executive editor, respondent Charles M. Hauser, (J.A. 117), felt that it was crucial not to halt publication of even one edition because of the temporary restraining order. (J.A. 150). Due to its schedule, the Journal had until 10:30 p.m. on November 13, 1985 to determine if it was going to publish the next morning notwithstanding the temporary restraining order. (J.A. 123).

On November 14, 1985 the Journal and Hauser, although aware of the court's order, published articles concerning Patriarca from the materials illegally gathered by the FBI. (J.A. 34, 39, 45-48, 49, 55-57, 121).

Patriarca filed a motion to adjudge the Journal and Hauser in contempt. (J.A. 199, 223). Since the United States Attorney for the District of Rhode Island represented parties in Patriarca's lawsuit, and since Patriarca's attorney declined to appear as prosecutor, the court, pursuant to Fed. R. Crim. P. 42(b), appointed a special prosecutor. (J.A. 237). The special prosecutor began criminal contempt proceedings against the Journal and Hauser. (J.A. 1, 3).

Notice of the criminal contempt proceedings was given (J.A. 3, 31) and a hearing was held. (J.A. 1 (February 10, 1986 entry)). In addition, an agreed statement of facts was submitted. (J.A. 33, 114-15). Thereafter the court issued an opinion holding the Journal and Hauser in criminal contempt. (Pet. App. A-1-A-22).

In its opinion the court defined the issue as whether publication can be deferred to permit a court an opportunity to determine the right to publish. (Pet. App. A-2). The court determined

> (1) that the Journal does not enjoy its claimed unique, superior constitutional status, free of all judicial inquiry; (2) that the people of the United States are entitled a judicial determination of the extent of their Fourth Amendment security; (3) that it has been previously determined that the Journal had no right to the information, a determination of which the Journal had actual knowledge, and (4) that determinations of constitutional rights are vested by the Constitution in the Courts of the United States.

(Pet. App. A-3).

Another hearing was held regarding sentencing. (J.A. 1 (March 27, 1986 entry)). A penalty of fifty cents per copy was assessed against the Journal for a total fine of $100,000. (Pet. App. A-25). An eighteen month jail term was imposed on Hauser, which was suspended, and Hauser was ordered to perform 200 hours of public service. (J.A. 196, 197).

The Journal and Hauser appealed. (J.A. 2). On appeal, a panel of the Court of Appeals for the First Circuit reversed the contempt judgment. (J.A. 2, Pet. App. A-46).

The panel held that while court orders must normally be obeyed until vacated or modified (Pet. App. A-32), the temporary restraining order was "transparently invalid" and therefore could be disregarded by the Journal and Hauser. (Pet. App. A-44). No exact definition of transparently invalid was stated. (Pet. App. A-35). The panel held that the Journal and Hauser were not required to seek judicial review before violating the order. (Pet. App. A-44).

The special prosecutor moved for rehearing with a suggestion that the matter be heard en banc. (Pet. App. A-47). The court granted the suggestion for en banc consideration but denied rehearing. (*Id.*) Rather, the en banc court, with Judge Selya withholding concurrence, issued an opinion as an addendum to, and modification of, the panel opinion while allowing the panel's opinion and order thus modified to stand. *Id.*

The en banc addendum opinion, in what the court described as dictum (Pet. App. A-49), suggested that publishers subject to prior restraint orders should make a good faith effort to seek emergency relief. (Pet. App. A-48). In this case, however, the court had no "clear conviction" that emergency relief was available to respondents within the restraints governing the publisher's decision making. (Pet. App. A-49). Also, the court believed it would be unfair, because of the publisher's failure to follow the procedures announced in the addendum opinion, to subject respondents to the sanctions imposed. *Id.*

A petition for writ of certiorari was filed on July 9, 1987. The petition was granted on October 5, 1987.

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SUMMARY OF ARGUMENT

The court, rather than a litigant, has the power to decide cases and controversies. U.S. Const. art. III, § 1. An order of a court with jurisdiction—whether it is right or wrong—is to be obeyed until set aside. *Walker v. City of Birmingham,* 388 U.S. 307, 319-21 (1967); *United States v. United Mine Workers,* 330 U.S. 258, 290-93 (1947); *Howat v. Kansas,* 258 U.S. 181, 189-90 (1922). Invalidity of the order cannot be raised in defense of contempt proceedings for violating it. *Howat v. Kansas,* 258 U.S. at 189-90. These rules apply even though free press rights are implicated. *United States v. Dickinson,* 465 F.2d 496 (5th Cir. 1982).

The circumstances of this case justify the issuance of the order. The facts here are critical.

Patriarca presented the district court with an unusual request: enjoin the media and federal agencies and officials from disseminating and publishing information about his private affairs which was obtained by electronic surveillance in violation of his fourth amendment rights. The materials Patriarca sought to have suppressed had been denied to the Journal in previous litigation. *Providence Journal Co. v. Federal Bureau of Investigation,* 602 F.2d 1010 (1st Cir. 1979), *cert. denied,* 444 U.S. 1071 (1980). A serious, novel issue was raised: Where there is a final judgment denying a newspaper information about an individual's private affairs, and such information was seized in violation of fourth amendment rights, may the newspaper publish that information? The court should have been allowed to take at least a short time to consider the matter. *United States v. United Mine Workers,* 330 U.S. at 290-93.

There can be no excuse for the Journal not requesting, in any court, any stay, vacation or modification of the order. This is especially so where the Journal requested a continuance. The postponement—granted for the Journal's convenience—caused the restraint to be extended.

The Journal essentially, and unlawfully, instituted itself as a tribunal of a higher rank than the district court. Although it had no power to do so, the Journal determined that its rights were superior to Patriarca's and that it could ignore the district court's order. The contemptuous publication which followed should not be tolerated.

Judicial review and remedies were available. The district court could have been advised by the Journal of a sense of urgency and its conviction that the order was wrong and was to be violated. That message, along with a motion to the district court to vacate, may have obtained relief for the Journal. Likewise, the Journal should have applied for redress with the court of appeals by petition for writ of mandamus[3] or appeal. *In re San Juan Star Co.,* 662 F.2d 108, 112-13 (1st Cir. 1981). "It cannot be presumed that the . . . courts would have ignored [respondents'] constitutional claims." *Walker v. City of Birmingham,* 388 U.S. at 319.

There is no exception to the rule requiring compliance with court orders based on degrees of invalidity. The First Circuit's ruling effectively, and incorrectly, invested the Journal with Article III power. It substituted the Journal in place of the district court as the arbiter of Patriarca's lawsuit.

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[3]Judiciary and Judicial Procedures, ch. 646, § 1, 62 Stat. 944 (1948) (codified as amended at 28 U.S.C. § 1651(a) (1982 & Supp. III 1985)).

The temporary restraining order, in any event, was not transparently invalid. The Journal presented no legal authority to the court that Patriarca's fourth amendment rights must be sacrificed as the price of the Journal exercising its first amendment rights. The first amendment is not absolute. *Nebraska Press Association v. Stuart,* 427 U.S. 539, 570 (1976). The First Circuit had handed down several rulings which suggested, at least, that the district court have some time to reflect on the issue. Logically, where the question was not easy, the decision to briefly preserve conditions while considering it cannot be considered frivolous.

The issue of whether first amendment protection would apply "no matter how shabby or illegal the means by which the information is obtained, no matter how serious an intrusion on privacy might be involved" is a question at least one justice of this Court has reserved for consideration. *Nebraska Press Association v. Stuart,* 427 U.S. at 617 (Stevens, J., concurring).

Also, *Near v. Minnesota,* 283 U.S. 697 (1931), which defined when prior restraints might be acceptable, left open "questions as to the extent of authority to prevent publications in order to protect private rights. . . ." 283 U.S. at 716 (footnote omitted).

Pending a final decision, trial and appellate courts in the Pentagon Papers cases in New York and Washington, D.C. all stayed publication by newspapers. Publication was stayed in those cases even though the government's injunction request was not based upon any recognized legal grounds for granting a prior restraint. Publication was stayed notwithstanding that the evidence proffered

by the government was insufficient to sustain a prior restraint. In *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976), publication was restricted pending consideration by the courts. Moreover, the district court did essentially what the First Circuit did earlier. The court of appeals previously had stayed an order which would have allowed the Journal to obtain access to and publish the FBI materials regarding Patriarca. *Providence Journal Co. v. Federal Bureau of Investigation,* 595 F.2d 889 (1st Cir. 1979).

There are other examples of prior restraints. Publication of pretrial discovery materials may be restrained. *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 33 (1984). Copyright law permits prior restraints. *Salinger v. Random House, Inc.,* 811 F.2d 90 (2d Cir.), *cert. denied,* — U.S. —, 108 S. Ct. 213 (1987). Federal agencies such as the National Labor Relations Board and the Federal Trade Commission may issue cease and desist orders which infringe upon free speech. *National Labor Relations Board v. Gissel Packing Co.,* 395 U.S. 575, 616-20 (1969); *National Commission on Egg Nutrition v. Federal Trade Commission,* 570 F.2d 157, 162-64 (7th Cir. 1977), *cert. denied,* 439 U.S. 821 (1978). Publication which irreparably harms an individual's business interests has been enjoined. *American Federation of Musicians v. Stein,* 213 F.2d 679 (6th Cir.), *cert. denied,* 348 U.S. 873 (1954).

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ARGUMENT

I. THE COURT HAD AUTHORITY TO ISSUE ITS ORDER AND THAT ORDER SHOULD HAVE BEEN OBEYED.

Courts—not newspapers—are the sole authority to resolve cases and controversies. The district court had the authority to issue the temporary restraining order. The Journal, having elected to take no action to seek lawful relief, should have obeyed it. A litigant may not judge his own case. The Journal had no authority to determine the outcome of its controversy with Patriarca.

A litigant has no power to issue orders to resolve cases. U.S. Const. art. III, § 1; *Ex Parte Pennsylvania,* 109 U.S. 174, 176 (1883);[4] *Jecker v. Montgomery,* 54 U.S. (13 Howard) 498, 515 (1852); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). Where courts have jurisdiction, their orders, however erroneous, are to be obeyed until such orders are vacated or modified. *Walker v. City of Birmingham,* 388 U.S. 307, 319-21 (1967); *United States v. United Mine Workers,* 330 U.S. 258, 290-93 (1947); *Howat v. Kansas,* 258 U.S. 181, 189-90 (1922). People may not bypass orderly judicial review of injunctive orders and disobey them. *Walker v. City of Birmingham,* 388 U.S. at 320. One may not raise in defense of contempt proceedings for violation of an order that the order was invalid. *Howat v. Kansas,* 258 U.S. at 189-90. These rules apply

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[4]Congress alone has the power to determine whether the judgment of a court of the United States, of competent jurisdiction, shall be reviewed or not. If it fails to provide for such a review, the judgment stands as the judgment of the court of last resort, and settles finally the rights of the parties which are involved.

Ex Parte Pennsylvania, 109 U.S. 174, 176 (1883).

even when the injunction prohibits exercise of first amendment rights. *Id.; United States v. Dickinson,* 465 F.2d 496 (5th Cir. 1982).

The Journal effectively made its own determination that (1) its rights were superior to those of Patriarca and, (2) it, not the courts, had the sole authority and power to make such a determination. Exercise of contempt powers enables courts to enforce orders necessary for the proper administration of law and for the protection of the rights of litigants. *Bessette v. W. B. Conkey Co.,* 194 U.S. 324, 333 (1904). The behavior of the Journal which followed its anarchic determinations should not be tolerated.

Courts with jurisdiction[5] have power to issue temporary restraining orders to maintain the status quo to afford the court an opportunity for more complete consideration of the merits of a lawsuit. *United States v. United Mine Workers,* 330 U.S. at 290-93; *see also National Maritime Union v. Aquaslide 'N' Dive Corp.,* 737 F.2d 1395, 1399, 1400 n. 6 (5th Cir. 1984) (this rule applies even where a recent opinion of an appellate court, unknown to the trial court or counsel, would be dispositive). A serious issue was raised as to whether fourth amendment rights and privacy interests may be destroyed by exercise of the media's first amendment rights. It was a novel question —one which deserved at least some brief consideration. *United States v. United Mine Workers,* 330 U.S. at 310-11

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[5]The court had jurisdiction over the parties and subject matter. There never was any dispute that the Journal was properly before the court. There can be no question that the court had jurisdiction to resolve the constitutional claim brought before it. *Bell v. Hood,* 327 U.S. 678, 684 (1946).

(Frankfurter, J., concurring) (where an issue is "complicated and novel" existing conditions may be maintained to allow the necessary time for fair consideration of the question; "[t]o say that the authority of the court may be flouted during the time necessary to decide is to reject the requirements of the judicial process."). Weighing heavily in favor of a brief restraining order was the judicial history regarding these particular FBI materials and the Journal's unsuccessful attempts to procure them. (J.A. 74, 179, Pet. App. A-5-A-9, A-10).

The trial judge, without a citation to some authority on the point, was unconvinced that Patriarca's rights must be secondary to the media's rights. (J.A. 61-62, 63-64, 73, Pet. App. A-17, A-18, A-22). After all, if the fruits of an illegal search and seizure may not be used against a person charged with a crime, the judge reasoned, should such materials be allowed to be used against any other citizen? (J.A. 161-62, Pet. App. A-16). If an action for money damages is an inadequate remedy for one accused of a crime, why should a civil damages action be an adequate remedy for any other victim of unconstitutional invasion of privacy? (Pet. App. A-16). Finally, the judge considered whether the fourth amendment is of any real value if the government may trample on the rights of those it perceives to be its enemies and then transmit the unlawfully obtained information to the free press? (J.A. 160, 161, Pet. App. A-14-A-15, A-16). The trial judge evidently had these questions in mind at the chambers conference. (J.A. 61-62, 73, 83, 160, 161, 162, 174, 182, 186, Pet. App. A-14-A-15, A-16).

Given the judicial history regarding the FBI materials, the novel legal issues, Patriarca's prayer for relief

from irreparable harm and the Journal's request for a continuance, petitioner submits that the trial court had authority to briefly restrain publication.

The Journal should not now be heard to claim that it need not suffer the court's order and need not seek any lawful relief from it. What the Journal did not do before leaving the temporary restraining order conference, or thereafter, was to urge or demand an immediate hearing. (J.A. 167). There is no indication in the record that the court was advised that the Journal intended to publish notwithstanding any order or that there was any sense of urgency. Indeed, and this point cannot be overly emphasized, the Journal asked for a postponement. (J.A. 167, Pet. App. A-3, A-10-A-11, A-13). That request resulted in the extension of the duration of the temporary restraining order. (J.A. 170, R. 1, Ex. A, November 13, 1985 order). What the Journal and Hauser did was decide that they were the ones who would determine the outcome of Patriarca's lawsuit. That behavior is an intolerable contempt. *United States v. United Mine Workers*, 330 U.S. at 294.

United States v. United Mine Workers, supra, affirmed criminal contempt judgments for violation of a district court order. Notwithstanding a serious jurisdictional question, 330 U.S. at 267-68, a temporary restraining order issued which effectively enjoined a coal workers strike. 330 U.S. at 266-67. The order issued two and one-half days before the strike was to begin. 330 U.S. at 290. Defendants ignored the order and the strike occurred. *Id.* As in this case, defendants filed no motion to vacate the order. *Id.* This disregard of the district court's order and the judicial process was not tolerated. *Id.*

> This Court has used unequivocal language in condemning such conduct, and has in *United States v. Shipp*, 203 U.S. 563 (1906), provided protection for judicial authority in situations of this kind.

Id. (footnote omitted).

The Journal has no judicial power, nor should it have as long as the historical mandate "a government of laws and not of men" applies. *United States v. United Mine Workers*, 330 U.S. at 307-09 (Frankfurter, J., concurring) (rule by "fiat of governmental or private power" was rejected by the Founding Fathers; challenge to acts of government must be by orderly process of law). The trial court was acting as fast as reasonably possible—certainly faster than the pace the Journal wanted set. The district court's order deserved respect. 330 U.S. at 311 (Frankfurter, J., concurring).

The Journal and Hauser breached the bedrock rule that court orders, even those destined to be ruled unconstitutional, must be obeyed until amended or vacated. *Walker v. City of Birmingham*, 388 U.S. 307, 319-21 (1967). Notwithstanding the *Walker* pronouncement, the First Circuit has essentially held that in certain circumstances individuals rather than courts are permitted to determine what the law is and how they shall govern themselves. Its ruling contradicts this Court's recent statement that,

> "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450, 31 S. Ct. 492, 501, 55 L.Ed. 797 (1911).

Young v. United States Ex Rel. Vuitton et Fils S.A., — U.S. —, —, 107 S. Ct. 2124, 2131 (1987).

There is no excuse for disregarding lawful means of seeking redress. Avenues of review were available to the Journal. The First Circuit entertains, in appropriate cases, expedited review of interlocutory orders encroaching on first amendment rights. *In re San Juan Star Co.*, 662 F.2d at 112, 113; *see also San Francisco Real Estate Investors v. Real Estate Investment Trust*, 692 F.2d 814, 816 (1st Cir. 1982) (expedited appeal of temporary restraining order was allowed in extraordinary circumstances). Relief was also available by writ of mandamus. 28 U.S.C. § 1651(a); *Stringfellow v. Concerned Neighbors In Action*, — U.S. —, —, 107 S. Ct. 1177, 1186 (1987) (Brennan, J., concurring) (review of district court orders by a petition for writ of mandamus is appropriate in extraordinary circumstances). If the district court or the court of appeals had been presented with requests for relief, the temporary restraining order may have been dissolved. If the legal question raised by the temporary restraining order request had been capable of only one simple conclusion, the First Circuit duty judge, if asked, presumably would have immediately dissolved the offending offer. "It cannot be presumed that the . . . courts would have ignored [respondents'] constitutional claims." *Walker v. City of Birmingham*, 388 U.S. at 319.

The fact that the temporary restraining order restricted first amendment rights does not exempt the Journal from the rule requiring compliance with court orders. *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1982). In that case the district court ordered news reporters not

to publish testimony given in a criminal trial, 465 F.2d at 500; that order was violated by publication and the reporters were held in criminal contempt. *Id.* On appeal, the Court of Appeals for the Fifth Circuit held that the gag order was "constitutionally unacceptable, and hence illegal." 465 F.2d at 509. Nevertheless, the Fifth Circuit held that a person must obey orders of a court with jurisdiction and that invalidity of the order, even where the invalidity is of constitutional proportions, may not be a defense to contempt charges. *Id.* The Fifth Circuit remanded the case to the district court to determine whether the contempt judgment or the punishment was appropriate in light of the unconstitutionality of the order. 465 F.2d at 514.

In support of its conclusion that the temporary restraining order could be violated and the order's invalidity raised as a defense to the criminal contempt charges, the First Circuit applied to this case the principle that even brief restraint of first amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (Pet. App. A-43-A-45). That pronouncement seems to be of no consequence in this matter, however, given the facts of this case. The Journal endured no immediate delay of its rights. Although its editor did not want to miss one edition of the Journal due to the temporary restraining order, this sense of urgency was not communicated to the court. In any event, the newspaper had until 10:30 p.m., about ten hours after the order issued, to determine if it wanted to publish in violation of the order. (J.A. 123, 150). The Journal did not, therefore, suffer

immediate delay or immediate harm due to the temporary restraining order.[6]

The court of appeals found the November 13, 1985 order lacking because the record discloses no factual determinations made by the judge at the chambers conference that the restraint would accomplish its goals and that no less restrictive measures were available. (Pet. App. A-41, A-45).[7] The need for such findings seems less important

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[6]Even if the principle that the briefest of restrictions on publication would be an intolerable violation of free speech was to apply here, petitioner asserts that the Journal should be estopped from now asserting such an argument. This estoppel arises from the Journal's rejection of the court's offer for a speedy hearing, its request for a postponement and the fact that no stay was requested. The Journal's actions and inactions amount to a waiver of the belated claim that the Journal's free speech rights were irreparably harmed during each moment following issuance of the order.

See Snepp v. United States, 444 U.S. 507 (1980). There the Court affirmed a judgment which, in part, enjoined a former Central Intelligence Agency agent from publishing information learned by him during his CIA service until after prepublication review and approval by the CIA. That restriction was grounded on a covenant in the agent's employment contract where he agreed "not to disclose any classified information relating to the Agency without proper authorization." 444 U.S. at 507-08 and 508 n. 1. In essence, Snepp apparently was considered to have contracted away his first amendment right to publish CIA information without prior CIA consent. *See* 444 U.S. at 509 n. 3, 511 and 444 U.S. at 520, n. 10, 524-25, 526 (Stevens, J., dissenting).

[7]There is no transcript of the proceedings during the November 13, 1985 chambers conference. (J.A. 184). Patriarca's counsel testified that the court at the chambers conference was putting the matter in a "holding pattern." (J.A. 172). The court wanted a few hours to reflect on the matter. (J.A. 171). In its opinion holding the Journal and Hauser in contempt, the trial court made it clear that the temporary restraining order issued

(Continued on following page)

or offensive to the Journal's rights inasmuch as the Journal was requesting a postponement.[8]

The Journal's articles about Patriarca were not "time bound."[9] This case is not one where a newspaper was restrained from publishing news about an imminent election, for example. The court in *United States v. Dickinson, supra,* required compliance with a gag order but it conditioned that ruling on the existence of adequate and effective remedies for orderly review of the offending order. 465 F.2d at 511. The Journal cannot be thought to be deprived of adequate or effective remedies. It did not even try to seek lawful redress. Because it sought no stay or review (J.A. 36), it did not experience frustration or

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to maintain the status quo. (Pet. App. A-10-A-11, A-18). The court stated that if the order did not issue, publication would make the matter moot. (Pet. App. A-10-A-11, A-18). Also, on November 18, 1985, when delivering a bench decision on the preliminary injunction, the trial court made reference to issuing the temporary restraining order in order to preserve the status quo. (J.A. 73).

[8]Furthermore, despite the court's request, the FBI materials were never produced by the Journal for the court's inspection. (J.A. 60, 143, Pet. App. A-17). There was, therefore, an "aura of mystery" about the FBI materials. (J.A. 60). The government produced the materials to the court but that was well after the November 13, 1985 conference. (J.A. 143, 200 (November 19, 1985 entry), 203 (January 10, 1986 entry), 241).

[9]Rather than being time bound, the Journal's news story is about personal conversations between a young man and his father which occurred more than twenty years earlier. (J.A. 39, 45-48, 49, 55-57). Indeed, one can conclude that the Journal did not believe the Patriarca story was newsworthy in terms of necessity to hastily publish. (*See* Pet. App. A-43). The Journal had received the FBI materials some months before the temporary restraining order issued (J.A. 96, 132, 133), but it felt no need to rush it into print. (J.A. 142-43).

delay due to the lawful judicial process. In these circumstances it should not be excused from disobeying the temporary restraining order.[10]

It is certainly true that prior restraints are disfavored. *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971). The press therefore has broad, but not unlimited, power.[11] *Near v. Minnesota,* 283 U.S. 697, 708, 716 (1931);

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[10]In *Walker v. City of Birmingham,* 388 U.S. 307 (1967), the Court upheld criminal contempt judgments for violation of an injunction prohibiting a march against racial discrimination. The Court made it clear that it was influenced by the fact that two days passed between the time the injunction issued and the planned march yet no effort was made to obtain relief from the order. 388 U.S. at 318. The Court stated that:

> This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with *delay* or *frustration* of their constitutional claims.

Id. (emphasis added). *See also United States v. Dickinson,* 465 F.2d at 512 (timeliness of publication is important but where there is no showing that the appellate process was slow or stalled, violation of a gag order, without resort to judicial remedies, will not be tolerated).

Several commentators have suggested that before a violation of an invalid order can be excused, at least some attempt at lawful review must be made; if no relief is quickly provided, then collateral attack of the order's invalidity at contempt proceedings may be permissible. Cox, *The Void Order and the Duty to Obey,* 16 U. Chi. L. Rev. 86, 113 (1948); Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart,* 29 Stan. L. Rev. 497, 509-10 (1977).

[11]In *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976), the Court suggested that the wide latitude for freedom of the press implies a concomitant duty, "something in the nature of a fiduciary duty," to exercise that right responsibly. 427 U.S. at 560.

Nebraska Press Association v. Stuart, 427 U.S. 539, 570 (1976). No precedent exists, however, for making the power of the press equivalent to or a substitute for judicial authority.

If an order is clearly wrong, it is there that the judicial process of an orderly and civilized society ought to begin, not end. "[R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." *Walker v. City of Birmingham*, 388 U.S. at 321.

The First Circuit's opinion has sent a signal to the people, a signal which, given the contemnors before it, is not limited to distribution only via the Federal Reporter. The First Circuit's message seems clear: when one firmly and sincerely disagrees with a court mandate, one is at liberty to make her or his own determination regarding that order's validity and ignore it if that is what she or he desires to do. An orderly society requires respect for the courts which are entrusted by it to lay down the law. *United States v. United Mine Workers*, 330 U.S. at 312 (Frankfurter, J., concurring). Where one is permitted to ignore the court's lawful authority, the rights, protections and privileges of others may be destroyed. *Id.* "[N]o man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics or religion." *Walker v. City of Birmingham*, 388 U.S. at 320-21.

If there were clear judicial precedent, the trial court's task would have been easier. For example, if the court had been confronted with a motion by a defendant in a criminal case seeking to enjoin publication, the court would

have had ample guidance. Criminal defendants' sixth amendment rights may be safeguarded in a variety of ways from a newspaper's exercise of its first amendment rights. *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). *See also In re Globe Newspaper Co.*, 729 F.2d 47 1st Cir. 1984) (bail hearings, notwithstanding the public's first amendment right of access, were closed to protect the defendants' *privacy* and fair trial rights until defendants had a fair opportunity to challenge the validity of FBI electronic surveillance). There have been no guidelines set yet, at least none which were brought to the court's attention, which might safeguard Patriarca's privacy interests. Likewise, there was no precedent, at least none provided by the Journal, instructing the court that Patriarca's rights had to be sacrificed so that the Journal's rights might be exercised.

Trial courts when faced with requests for injunctions do not have the luxury of much time to reflect on novel legal issues. Undoubtedly the trial court would have liked at least a few hours to consider applicable law. (J.A. 171, Pet. App. A-17). Trial judges can only be expected to do their best. An orderly society requires respect for such efforts. *United States v. United Mine Workers*, 330 U.S. at 290-93. Where an injunction is issued in the circumstances of this case, that is, where legal issues are being fairly and swiftly considered, it should not be subject to being labeled "transparently invalid" and written off as a complete nullity.

Certainly if the injunction issued in *Walker* should have been obeyed, the order issued in the circumstances of this case is worthy of respect. In *Walker* the Court upheld

the Alabama rule that court orders must be obeyed until set aside and the invalidity of an order cannot be raised as a defense to criminal contempt proceedings. That case affirmed criminal contempt judgments against marchers against racial discrimination who were enjoined from picketing without a permit.

After stating that the court issuing the injunction had jurisdiction, the *Walker* Court added, "And this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity." 388 U.S. at 315. From this dicta the court of appeals has gleaned an exception to the rule requiring people to obey court orders.[12] (Pet. App. at A-33). The First Circuit's opinion holds that a "transparently invalid" order cannot form the basis for a contempt citation (Pet. App. A-33, A-45-A-46) and one may challenge the validity of a transparently invalid order at contempt proceedings. (Pet. App. A-45). No precise definition of transparently invalid is offered. (Pet. App. A-35). The First Circuit's opinion essentially equates transparently invalid with lack of jurisdiction[13] (Pet. App.

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[12]The First Circuit is not the only authority which concludes that *Walker* provides that orders which are "transparently invalid" may be disobeyed and challenged collaterally in defense of criminal contempt charges. *See, e.g., Glen v. Hongisto,* 438 F. Supp. 10, 15 (N.D. Calif. 1977); Barnett, *The Puzzle of Prior Restraint,* 29 Stan. L. Rev. 539, 555 (1977); Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart,* 29 Stan. L. Rev. 497, 509 (1977). It is open to question whether these authorities would reach this conclusion if presented with the facts of this case.

[13]All of the cases mandating compliance with orders until they are set aside require that personal and subject matter jurisdiction exist. *See, e.g., Walker v. City of Birmingham,* 388 U.S. 307, 315, 319-21 (1967); *United States v. United Mine Workers,* 330 U.S. 258, 290-94 (1947); *Howat v. Kansas,* 258 U.S. 181, 189-90 (1922).

A-34) and concludes that one need not obey a transparently invalid order.[14] (Pet. App. A-45-A-46).

The rule recited in *Walker,* which was adopted from *Howat v. Kansas,* 258 U.S. at 189-90, contains no transparently invalid exception. 388 U.S. at 314. Significantly, the *Walker* Court repeated the *Howat* language:

> An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, *must be obeyed* by them *however erroneous the action of the court may be,* even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. *It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed* for error by orderly review, either by itself or by a higher court, *its orders* based on its decision *are to be respected,* and disobedience of them is contempt of its lawful authority, to be punished. 258 U.S., at 189-190.

388 U.S. at 314 (emphasis added).

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[14]The First Circuit's en banc addendum opinion suggests in dictum (Pet. App. A-49) that a publisher should "make a good faith effort to seek emergency relief from the appellate court." (Pet. App. A-48). If timely relief is not forthcoming from the appellate court, then a newspaper may publish and, if charged with criminal contempt, challenge the order at those proceedings. (*Id.*). This dictum is simply a recitation of the teachings of *Walker v. City of Birmingham,* 388 U.S. 307 (1967), and *United States v. Dickinson,* 465 F.2d 496 (5th Cir. 1982): orders restricting first amendment rights must be obeyed at least until the party restrained meets with frustration or delay by the appellate process. Since the First Circuit's dictum simply followed the existing law, the Journal's behavior should not have been condoned. The judgment of conviction should not have been reversed.

The *Walker* injunction was issued *ex parte*. 388 U.S. at 309-10, 319. It issued pursuant to a Birmingham, Alabama statute which "would *unquestionably* raise *substantial* [first amendment] issues." 388 U.S. at 316 (emphasis added). Indeed, that ordinance was eventually stricken down as unconstitutional on its face. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147 (1969).

The Court took as fact the contemnors' allegations that the ordinance in the past had been administered in an arbitrary and discriminatory fashion. 388 U.S. at 317-18. A representative of one of the leaders of the marchers attempted to apply for a parade permit and was "rudely rebuffed." 388 U.S. at 317, n. 9, 325 (Warren, C.J., dissenting), 335 (Douglas, J., dissenting) and 339 (Brennan, J., dissenting). Upon arriving at the Birmingham City Hall she was directed to Commissioner Eugene "Bull" Connor. The march representative testified that, "He said, 'No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail,' and he repeated that twice." 388 U.S. at 317 n. 9. Two days later a telegram by Reverand Shuttlesworth, one of the marchers' leaders, was sent to Commissioner Connor requesting a permit to picket. 388 U.S. at 335-36 (Douglas, J., dissenting). Commissioner Connor responded the same day with a telegram "insist[ing]" that there be no picketing. 388 U.S. at 336 (Douglas, J., dissenting) and 339-40 (Brennan, J., dissenting). With this background, it is understandable that the administration of the parade ordinance was considered to be arbitrary and discriminatory.

The *Walker* injunction suffered not only from being issued pursuant to an ordinance of suspect constitutional

validity on its face and suspect application to the Birmingham marchers, but also, as the Court noted, "The breadth and vagueness of the injunction itself would also *unquestionably* be subject to *substantial* constitutional question." 388 U.S. at 317 (emphasis added). Nevertheless, the *Walker* injunction was not considered transparently invalid and the contemnors were not excused from exhausting legal avenues of review. *Walker* did not analyze the injunction in terms of whether on the merits it was transparently invalid or not. Rather, that case held that where the contemnors ignored any and all opportunities for orderly judicial review, no collateral review was available. 388 U.S. at 318-21.

If the order in *Walker* should have been obeyed, by comparison the order in this case certainly was authorized and should have been obeyed. Chief Judge Boyle had just several weeks before the November 13, 1985 chambers conference attended the First Circuit Judicial Conference in Puerto Rico where one of the lectures dealt with the emerging and perplexing issue of constitutional privacy rights conflicting with the media's right of free speech. (J.A. 73, 174, 182). To illustrate the novelty of the question raised, one need only note that the Journal objected to the court scheduling a hearing within twenty-four hours and requested a continuance in order to gather and present authorities. (J.A. 167, Pet. App. A-3, A-10-A-11, A-13). The trial judge was concerned about Patriarca's fourth amendment privacy rights being completely destroyed by publication. (J.A. 174, *see also* J.A. 73, 182, Pet. App. A-10, A-18).

It is in this setting that the trial judge issued the temporary restraining order. In these circumstances, peti-

tioner submits, the trial judge was acting within his authority when he briefly restrained publication. Patriarca's case should have been resolved by the district court's determination—not by the appellate review exercised by the Journal and Hauser.

II. THE TEMPORARY RESTRAINING ORDER WAS NOT "TRANSPARENTLY INVALID."

The question facing the trial court was novel, serious and difficult. Restrictions on speech are not unprecedented. The temporary restraining order was not frivolous or transparently invalid.

Petitioner takes the position that the rule against violation of orders issued by courts with jurisdiction contains no exception based on degrees of invalidity of such orders.[15] Even if there is such an exception, it does not apply here. There are a variety of reasons why this brief restraint was not frivolous or transparently invalid.

Patriarca suffers no less because the FBI, which was prohibited by an Act of Congress[16] from willfully disclos-

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[15]The rule necessitating compliance with court orders upon peril of criminal contempt sanctions is conditioned upon the court having jurisdiction. Courts have jurisdiction to determine their jurisdiction and even if ultimately the court later finds that jurisdiction is lacking, orders outstanding until that time must be obeyed. *United States v. United Mine Workers*, 330 U.S. at 292. If there is any exception to the general rule, petitioner submits that it arises only where there might be lack of jurisdiction due to be bad faith of the court. *See* 330 U.S. at 292 n. 57. There can be no question that in this case the court exercised its authority in a laudable good faith effort to do justice to all parties.

[16]18 U.S.C. §§ 2511(1), 2520; *Providence Journal Co. v. FBI*, 602 F.2d at 1013-14.

ing the information, handed off the illegally obtained materials to the Journal. The Journal, as a party to the prior litigation, presumably knew very well of the First Circuit's rulings regarding the materials in question. (Pet. App. A-3). It nevertheless resumed its efforts to obtain the information about Patriarca which was constitutionally protected.[17] By doing so the Journal enlisted the FBI in a "tag-team" assault on Patriarca's privacy rights. On November 13, 1985 the issue appeared to be momentous and its resolution was not obvious. The court's reaction to these circumstances, therefore, cannot be considered to be frivolous.

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), established guidelines for accommodating free press rights while safeguarding the right to a fair trial of one charged with a crime. Of interest from that case are Justice Stevens' comments in his concurring opinion. He believed that the judiciary is able to protect a criminal defendant's right to a fair trial without gagging the press, and that it may not do so. 427 U.S. at 617 (Stevens, J., concurring). Significantly, he specifically left open the

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[17]Although in 1976 the FBI, in deference to individual privacy interests, opted not to honor the Journal's request for the Patriarca materials (J.A. 214-16), *Providence Journal Company v. FBI*, 602 F.2d at 1011, in 1985 it accommodated the Journal's renewed request. (J.A. 96), *Patriarca v. FBI*, 639 F. Supp. 1193, 1195 (D.R.I. 1986). It should be recalled that in response to the Journal's 1976 efforts to obtain the FBI materials, the courts would not allow access to private matters concerning Raymond L. S. Patriarca or his living family members. *Providence Journal Company v. FBI*, 460 F. Supp. at 789-90, *aff'd*, 602 F.2d 1010, 1012, 1015. Assuming that the FBI was acting in good faith in 1985, apparently the materials were proffered by mistake. *Patriarca v. FBI*, 639 F. Supp. at 1196.

question of whether the same absolute first amendment protection would apply

> no matter how shabby or illegal the means by which the information is obtained, no matter how serious an intrusion on privacy might be involved, no matter how demonstrably false the information might be, no matter how prejudicial it might be to the interests of innocent persons, and no matter how perverse the motivation for publishing it . . .

Id. Similarly, *Near v. Minnesota,* 283 U.S. 697 (1931), while broadly condemning prior restraints, carefully left open "questions as to the extent of authority to prevent publications in order to protect private rights. . . ." 283 U.S. at 716 (footnote omitted).

As Mr. Justice Frankfurter explained, "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 441 (1957). Rather, what he favored was a " 'pragmatic assessment of its operation in the particular circumstances.' " 354 U.S. at 442 (citation omitted). Chief Judge Boyle was preserving the status quo while he invited counsel to help him in an unprecedented legal setting to make a reasoned, pragmatic assessment of the facts and law in these particular circumstances.

The First Circuit seems to have viewed the temporary restraining order interchangeably with the ultimate merits of the preliminary injunction request. That is, the court of appeals seems to focus not on whether the restraining order was frivolous, but rather whether a more permanent prohibition would have been justified.[18]

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[18]A temporary restraining order and a preliminary injunction are significantly different. *See generally* 7 Moore's Federal

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The court of appeals began its explanation of why the district court's order was transparently invalid by stating that this Court has never upheld a prior restraint on pure speech. (Pet. App. A-37). The court then invoked *New York Times Co. v. United States,* 403 U.S. 713 (1971). (Pet. App. A-37). While that case denied a request to enjoin publication, it is nevertheless an instance where brief restraints to publication were issued to afford limited time for judicial review. 403 U.S. at 714. In this respect the trial court here did exactly what was done in *New York Times Co. v. United States, Id.*

Short prior restraints on pure speech are not unprecedented. The Pentagon Papers cases are perhaps the best examples of temporary prior restraints imposed in order to maintain the status quo while courts quickly consider the merits of a publication injunction request. In those cases the government brought actions in the United States District Courts for the District of Columbia and the Southern District of New York to enjoin newspapers from publishing materials derived from a Pentagon study regarding this country's military involvement in Southeast Asia. *United States v. Washington Post Co.,* 446 F.2d 1327 (D.C. Cir.) (en banc), *aff'd,* 403 U.S. 713 (1971); *United States v. New York Times Co.,* 328 F. Supp. 324 (S.D.N.Y.), *rev'd,* 444 F.2d 544 (2d Cir.) (en banc), *rev'd,* 403 U.S. 713 (1971). The government alleged in those cases that disclosure of the Pentagon Papers would create

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Practice, Part 2, ¶ 65.05 (2d ed. 1986). A temporary restraining order is designed to hold matters in status quo for a short period of time so that a more complete hearing and presentation of evidence can be made.

a "grave and irreparable danger" to national security. *New York Times Co. v. United States*, 403 U.S. 713, 732 n. 2 (1971) (White, J., concurring).

In New York the district court granted a temporary restraining order pending the hearing on the government's motion for preliminary injunction, *United States v. New York Times Co.*, 328 F. Supp. at 325, but denied the motion for preliminary injunction after reviewing evidence and determining that it was insufficient to sustain the government's request. 328 F. Supp. at 331. Even though the trial judge denied the motion for preliminary injunction, he continued the temporary restraining order until the government could seek a stay from the Court of Appeals for the Second Circuit. *Id.* That court issued a stay, and later ordered the case remanded for further evidentiary review within two days with the stay to remain in effect until that time. *United States v. New York Times Co.*, 444 F.2d at 544.

In the District of Columbia, the district judge rejected the government's preliminary injunction request and the court of appeals affirmed. *United States v. Washington Post Co.*, 446 F.2d at 1328. Nevertheless, stays were granted as the litigation proceeded up the judicial ladder. 446 F.2d at 1329.

Finally, this Court issued a stay which briefly restrained publication. *New York Times Co. v. United States*, 403 U.S. at 714. At each stage in the Pentagon Papers cases, the *Times* and *Post* respected the restraining orders and stays.[19]

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[19]If the *Times* or the *Post* had published notwithstanding this Court's stay, they could have been held in contempt of this

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The Pentagon Papers cases were not "troopship" situations. *New York Times Co. v. United States*, 403 U.S. at 726-27 (Brennan, J., concurring); *Near v. Minnesota*, 283 U.S. at 716. The government's argument in the Pentagon Papers cases did not rest upon any recognized exception to the rule against prior restraints. *Id.* Even though factual determinations had been resolved against any finding of clear and present danger, publication was nevertheless restrained so that the novel legal issues raised by the government could be considered. The trial court in this case did no more than that which was done in the Pentagon Papers cases.

Nebraska Press Association is another case where several lower courts permitted restrictions on the press pending review of an issue theretofore unresolved by this Court. 427 U.S. at 542, 543, 544, 545. Pending review on certiorari, this Court denied a stay of the order which restricted the media's first amendment rights. *Nebraska Press Association v. Stuart*, 423 U.S. 1027 (1975); *see also Nebraska Press Association v. Stuart*, 423 U.S. 1327, 1332, 1333-34 (1975) (Blackmun, Circuit Justice 1975) (stay denied in part on motion to Justice Blackmun as Circuit Justice).

Where the media was restrained from publishing while the *Nebraska Press Association* case was being considered by the courts, the trial court in this case can hardly be

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Court. *Merrimack River Savings Bank v. City of Clay Center*, 219 U.S. 527, 535-36 (1911); *United States v. Shipp*, 203 U.S. 563, 572 (1906); *but see Young v. United States Ex. Rel. Vuitton et Fils S.A.*, — U.S. at —, 107 S. Ct. at 2146 (Scalia, J., concurring).

faulted for its brief order. In *Nebraska Press Association* the courts were presented with an unresolved conflict of important constitutional rights. 427 U.S. at 551, 570. Here, the district court was being asked to reconcile important constitutional rights. In *Nebraska Press Association* the Court noted that the authors of the Bill of Rights did not set priorities between the first and sixth amendments. 427 U.S. at 561. Similarly, no priorities are evident between the first and fourth amendments. Finally, the district court's order should be analyzed under the admonition that

> this Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.

Nebraska Press Association v. Stuart, 427 U.S. at 570 (citations omitted).

A final example of a court issuing a stay pertaining to publication, or at least access to information, is *Providence Journal Co. v. Federal Bureau of Investigation,* 595 F.2d 889 (1st Cir. 1979). That case involved the identical FBI materials as were implicated by Patriarca's complaint filed on November 8, 1985. No doubt the trial court had that case in mind when weighing the motion for injunctive relief. (Pet. App. A-7-A-8). In *Providence Journal Co. v. Federal Bureau of Investigation, supra,* the Court of Appeals for the First Circuit considered motions by Raymond L. S. Patriarca, an intervenor, and the FBI for a stay, pending appeal, of an order granting the Journal access to the FBI's illegally obtained materials. The district court had granted only a brief stay as it thought that anything longer would be a prior restraint. 595 F.2d at

890. The court of appeals balanced the Journal's right of access and publication against movants' rights. *Id.* The court held that a denial of a stay would irreparably harm Patriarca, destroy the status quo and moot the appeal. *Id.* Granting the stay, however, would simply postpone publication—assuming that the district court's order survived appellate review—during the time that the appeals were considered. *Id.*

This ruling, while not as close as the Pentagon Papers or *Nebraska Press Association* cases to the factual situation presented here, was certainly bound to influence the trial court. With this history it is understandable that the district court would have issued its temporary restraining order. Given the First Circuit's ruling on the stay, and its ultimate decision preventing the Journal access to the FBI materials, *Providence Journal Co. v. Federal Bureau of Investigation,* 602 F.2d 1010 (1st Cir. 1979), *cert. denied,* 444 U.S. 1071 (1980), the trial court's November 13, 1985 order should hardly be considered frivolous or transparently invalid.

Instances of restraints imposed in analogous situations provide support for the trial court's order in this case. In order to protect privacy rights, a newspaper may be ordered not to publish information obtained via pre-trial discovery. *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 32, 33 (1984); *In re San Juan Star Co.,* 662 F.2d 108, 115 (1st Cir. 1981). Once a newspaper litigant obtains possession of discovery materials, its position is substantially the same as the Journal's. In the same way that newspaper litigants have no first amendment right of access to pre-trial discovery, *Seattle Times Co. v.*

Rhinehart, 467 U.S. at 32, the Journal had no right of access to the FBI materials. *Providence Journal Co. v. Federal Bureau of Investigation*, 602 F.2d at 1013-14. If publication can be forbidden regarding pretrial discovery materials, the trial court in this case was justified in issuing the brief restraining order.

Copyright law offers another example of permissible prior restraints. *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, — U.S. —, 108 S. Ct. 213 (1987). Even where copyrighted information is factual and newsworthy, one's expression may be protected from use by another. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561, 564 (1985). Copyright law protects the author's right to publish first or not at all. 471 U.S. at 551, 552, 553. Likewise, the confidentiality of an author's expression is protected by copyright law. 471 U.S. at 564, *see also* 471 U.S. at 559-60 (an individual has a first amendment right, as well as a right under copyright law, not to speak publicly).

If Patriarca had a copyright to his taped conversations, he would be entitled to a prior and permanent restraint against the Journal's use of his expression. *Salinger v. Random House, Inc.*, 811 F.2d at 94. Common law copyright has often been used to protect personal privacy.[20] *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. at 554, citing Brandeis & Warren, *The Right of*

[20]Ironically, if Patriarca, rather than the FBI, taped and copyrighted his conversations, there would be little doubt that to protect his privacy the court would have authority to enjoin publication at least of Patriarca's verbatim expression; *See Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. at 551, *Salinger v. Random House, Inc.*, 811 F.2d at 94, 100.

Privacy, 4 Harv. L. Rev. 193, 198-99 (1890). Unless or until a person communicates his private expressions to the public, there may be no publication of those expressions by another without his consent. *Id.*

Courts, by custom, rules of evidence and procedure, regulate and restrict free speech in courtrooms and to and between sitting jurors. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104 n. 21 (1981). The Court of Appeals for the First Circuit even prohibits *post*-verdict interviews by counsel, litigants or their agents with jurors except in extraordinary circumstances and then only under the supervision of the trial judge. *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir.), *cert. denied*, — U.S. —, 106 S. Ct. 227 (1985); *but see Craig v. Harvey*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941) (out of court statements regarding pending cases could not be considered a clear and present danger to the administration of justice and were not contemptuous).

Federal agencies in certain circumstances are empowered to issue orders amounting to prior restraints. *New York Times Co. v. United States*, 403 U.S. at 731 n. 1 (White, J., concurring). Under 29 U.S.C. § 160(c), the National Labor Relations Board may issue cease and desist orders to prevent unfair labor practices.[21] *See, e.g., National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575, 616-20 (1969) (while an employer's first amendment rights are firmly established, 395 U.S. at 617,

[21]National Labor Relations Act, ch. 372 § 10(c), 49 Stat. 453 (1935) (codified as amended at 29 U.S.C. § 160(c) (1982 & Supp. III 1985)).

the NLRB may prohibit him from expressing any "threat of reprisal or force or promise of benefit" when communicating with his employees, 395 U.S. at 617, 618); *Associated Press v. National Labor Relations Board*, 301 U.S. 103 (1937) (the press was not immune from NLRB regulation notwithstanding a first amendment challenge, 301 U.S. at 131, 132-33 and 138 (Sutherland, J., dissenting)). Likewise, under 15 U.S.C. § 45(b), the Federal Trade Commission may issue orders enjoining unfair trade practices.[22] *See, e.g., National Commission on Egg Nutrition v. Federal Trade Commission*, 570 F.2d 157, 162-64 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978) (the FTC may prohibit false or misleading commercial speech); *see also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1975) (the first amendment does not prohibit a state from prohibiting untruthful commercial speech).

A final example to illustrate that the temporary restraining order was not so totally lacking in merit as to be considered frivolous and transparently invalid is *American Federation of Musicians v. Stein*, 213 F.2d 679 (6th Cir.), *cert. denied*, 348 U.S. 873 (1954).[23] There the

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[22]Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914) (codified as amended at 15 U.S.C. § 45(b) (1982 & Supp. III 1985)).

[23]The second paragraph on page 12 of the petition for certiorari reads:

> In *American Federation of Musicians v. Stein, supra*, a union was restrained from publication of plaintiff's name in the union's magazine on an "unfair" agents

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court of appeals affirmed an injunction prohibiting publication of the name of a musician's booking agent by a musicians' union in its magazine's "unfair" agents list. The agent was considered to be threatened with irreparable harm from the publication. 213 F.2d at 680, 682, 683, 689. The union argued that the first amendment denied the district court the power to enjoin publication. 213 F.2d at 680. The Sixth Circuit held that circulation of Stein's name on the unfair list was not an expression of opinion. 213 F.2d at 689. It therefore was not protected speech. The first amendment argument was rejected.[24] *Id.* "The law does not allow a citizen's rights to be destroyed under a perversion of freedom of speech." *Id.* (citation omitted).

The First Circuit held that the only potential danger from publication of the FBI materials was to an individ-

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> list. A *criminal contempt judgment for violation of the order was upheld.* The First Circuit is therefore also in conflict with the Sixth Circuit.

(emphasis added). The emphasized statement is incorrect.

A review of *American Federation of Musicians v. Stein, supra*, reveals that in that case there was no violation of the order or criminal contempt proceedings.

This error was discovered while petitioner's counsel was preparing petitioner's brief. The Clerk and respondent's counsel were immediately informed of this error. The authors apologize to the Court, respondents and their attorneys for this mistake.

[24]*Cf. Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911) (defendants who were convicted of contempt charges for violation of an order enjoining continuation of a boycott raised freedom of speech and of the press as a defense, 421 U.S. at 436; the constitutional issue was not decided since the injunction by its terms did not restrict publication, 421 U.S. at 436-37; but, the rule was recognized that where publication is used to continue an unlawful boycott, publication may be enjoined, 421 U.S. at 437).

ual's privacy interest. (Pet. App. A-45). The First Circuit held that a subsequent damages action would be adequate protection against such harm. *Id.* Stein was not restricted to a subsequent damages action. He was successful in preventing publication of his name in order to protect his opportunities for future musicians' bookings. The order issued on Patriarca's request for protection of his privacy is similar enough to the *American Federation of Musicians* order that it should have been obeyed.

CONCLUSION

The judgment of the court of appeals (A. 1), insofar as it reversed the criminal contempt conviction of the Journal and Hauser, should be reversed and the matter should be remanded to the district court for execution of the penalties imposed. (Pet. App. A-23-A-26).

Respectfully submitted,

WILLIAM A. CURRAN
1210 Turks Head Building
Providence, RI 02903-2274
(401) 421-2154
Counsel of Record

ROBERT D. PARRILLO
1210 Turks Head Building
Providence, RI 02903-2274
(401) 421-2154
Counsel for Petitioner

November 1987

APPENDIX

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1336

IN THE MATTER OF APPLICATION TO
ADJUDGE THE PROVIDENCE JOURNAL
COMPANY AND ITS EXECUTIVE EDITOR,
CHARLES M. HAUSER, IN CRIMINAL CONTEMPT,

PROVIDENCE JOURNAL COMPANY AND
CHARLES McC. HAUSER,

Appellants.

JUDGMENT

Entered: December 31, 1986

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court finding the Providence Journal Company and its executive editor, Charles M. Hauser, in criminal contempt is reversed.

Certified and issued as informal mandate under F.R.A.P. 41 on May 20, 1987.

Francis P. Scigliano

By: /s/ Richard W. Gordon
Chief Deputy Clerk

By the Court:
Francis P. Scigliano

Clerk.

[cc: Messrs: Abrams, Elliott, Goodale, Curran and Ms. Keats]

U.S. Constitution

Article III, § 1

Supreme Court and inferior courts—Judges and compensation.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Crimes and Criminal Procedure, ch. 645,
§ 1, 62 Stat. 701 (1948) (codified
as amended at 18 U.S.C. § 401(3)
(1982 & Supp. III 1985))

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—

• • •

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Federal Trade Commission Act,
ch. 311, § 5, 38 Stat. 719 (1914)
(codified as amended at
15 U.S.C. § 45(b) (1982 &
Supp. III 1985)).

(b) *Procedure by Commission.* Whenever the Commission shall have reason to believe that any such persons, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof

would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing Commission shall be of the opinion that the method of competition or the act, or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the

public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after the service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. "The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request."

Freedom of Information Act, P.L. 89-487,
80 Stat. 250 (1966) (Codified as amended
at 5 U.S.C. § 552 (1982 & Supp. III 1985))

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copy-

ing current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public inetrest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fees are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two

hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) [Repealed]

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such

appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request,

the court may retain jurisdiction and allow the agency additional time to comp'ete its review of the records. Upon any determinatio oy an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title [5 USCS § 552b]), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological or geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its

pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the rea-

son for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Judicial Code, ch. 231 § 240,
36 Stat. 1157 (1948) (codified
as amended at 28 U.S.C. § 1254(1)
(1982 & Supp. III 1985))

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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Judiciary and Judicial Procedures, ch. 646,
§ 1, 62 Stat. 944 (1948) (codified as
amended at 28 U.S.C. § 1651(a)
(1982 & Supp. III 1985))

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

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National Labor Relations Act, ch. 372
§ 10(c), 49 Stat. 453 (1935) (codified
as amended at 29 U.S.C. § 160(c) (1982
& Supp. III 1985))

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(c) *Reduction of testimony to writing—Findings and orders of Board.* The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state

its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organizations, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and [sic] order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

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Omnibus Crime Control and Safe Streets Act,
P.L. 90-351, 82 Stat. 213 (1968) (Codified
as amended at 18 U.S.C. § 2511(1) (1982
Supp. III 1985))

(1) Except as otherwise specifically provided in this chapter any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communications;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such persons knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or elec-

tronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

Omnibus Crime Control and Safe Streets Act,
P.L. 90-351, 82 Stat. 223 (1968) (Codified
as amended at 18 U.S.C. § 2520 (1982 &
Supp. III 1985))

(a) In General.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief.—In an action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of Damages.—(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the

communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of—

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) DEFENSE.—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) LIMITATION.—A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.